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In the Supreme Court of the United States

October Term, 1950 - - - - - - Number 355

CORBIN D. HUGHES, Administrator of the Estate of Harold G. Hughes,

Plaintiff-*Appellant*,

vs.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, a Wisconsin Corporation,

Defendants-*Respondents*.

Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF APPELLEES

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OPINION BELOW.

The opinion of the Supreme Court of the State of Wisconsin is reported in *Hughes vs. Fetter*, 257 Wis. 35, 42 N. W. (2d) 452, and may be found on pages 30 to 36, both inclusive, of the printed record.

JURISDICTION.

The order of the Hon. Oscar M. Fritz, Chief Justice of the Wisconsin Supreme Court, was entered August 29, 1950. The order of this court noting probable jurisdiction was entered on November 13, 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2).

STATE STATUTE INVOLVED.

Wisconsin Revised Statutes, Section 331.03, is involved and reads as follows:

> "*Recovery for death by wrongful act.* Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state."

QUESTION PRESENTED.

Does the full faith and credit clause, Art. IV, Sec. 1, and the due process clause, Fourteenth Amendment, Sec. 1, United States Constitution, require Wisconsin to enforce a cause of action founded upon the wrongful death statute of the State of Illinois where such enforcement would be contrary to the public policy of Wisconsin, as expressed by Sec. 331.03, Statutes of Wisconsin, prohibit-

ing the maintenance of an action for a wrongful death not caused within Wisconsin?

STATEMENT.

The plaintiff and appellant, Corbin D. Hughes, a resident of Wisconsin, after his appointment by the County Court of Milwaukee County as administrator of the estate of his son, Harold G. Hughes, deceased, commenced this action in the Circuit Court of Milwaukee County for the wrongful death of his said son based upon the wrongful death statute of the State of Illinois, Secs. 1 and 2, Chapter 70, Smith-Hurd Illinois Annotated Statutes. (R. 15, 28-29)

The son was injured in Illinois while riding as a passenger in an automobile driven by the defendant, Glenn C. Fetter, and died as a result of said injury in said state. At the time of his injury and death, the said Harold G. Hughes was a resident of Wisconsin. The defendant, Fetter, likewise, was a resident of Wisconsin and was such a resident at the time of the commencement of this action against him.

Judgment was entered in the trial court against the plaintiff dismissing his complaint upon the ground that the Wisconsin death statute, Sec. 331.03, Wisconsin Statutes (R. 21), forbids the bringing of an action for wrongful death in Wisconsin unless the death was caused therein. Upon appeal, the Wisconsin Supreme Court, in affirming the judgment of dismissal, held that the statute, so construed, did not contravene either the full faith and credit clause or the privilege and immunities clause of the United States Constitution. (R. 31-32)

SUMMARY OF ARGUMENT.

The decision of the Wisconsin Supreme Court, from which this appeal is taken, held that the Wisconsin death statute, Sec. 331.03, Wisconsin Statutes, limits the jurisdiction of the Wisconsin courts in a wrongful death action to one brought for a death caused in Wisconsin; that the legislature expressed the public policy of the state in this regard positively in a statute and that this policy must prevail to the exclusion of appellant's action, based on the Illinois wrongful death statute, in the Wisconsin courts. The appellant now contends that the Wisconsin statute, so construed, causes it to violate the full faith and credit clause and the due process clause of the United States Constitution.

The Wisconsin statute, so construed, does not contravene the full faith and credit clause because this clause does not require the enforcement of every right conferred by a statute of another state when the enforcement of such right would be contrary to the public policy of the forum.

As the full faith and credit clause establishes a rule of evidence rather than of jurisdiction, the effect of the Illinois statute upon which plaintiff bases his cause of action is fixed both by the Constitution and by the act of Congress passed in pursuance thereof (28 U. S. C. Sec. 1738) if the appellant can find a court into which he has a right to come. The Constitution, however, does not require the State of Wisconsin to provide a court for him against its will.

Decisions by the Supreme Court of the United States made subsequent to the decision in *Broderick vs. Rosner* (1935), 294 U. S. 629, 55 S. Ct. 589, refute the contention that the *Broderick* decision holds that the full faith and

credit clause of the Federal Constitution requires practically unlimited extraterritorial recognition of all statutes.

Whatever the purpose of the Wisconsin legislature may have been in confining the jurisdiction of its courts to those actions for wrongful death in which the wrongful act, neglect or default causing death occurred in Wisconsin, if it was to give statutory force to the doctrine of *forum non conveniens* then appellant's action is an appropriate one for the application of the doctrine. The trial of the action in Illinois, the state in which the cause of action arose, would be more easy, expeditious and less expensive than in Wisconsin.

The decisions principally relied upon by the appellant on appeal to this court are readily distinguishable from this case as they either deal with the enforcement of statutes governing statutory assessment of corporation stockholders or the members of a mutual insurance company or with the enforcement of a judgment and not, as here, with an unlitigated cause of action based upon the wrongful death statute of another state. An action based on the former is entitled to a greater amount of faith and credit by a state of the forum than is accorded to the latter.

As the states of Wisconsin and Illinois alone restrict the jurisdiction of their respective courts to actions for wrongful death caused within the state, no large national interest is involved justifying a disregard of the public policy of Wisconsin in excluding appellant's action for wrongful death based upon the statute of Illinois, which declares the very same public policy expressed by the Wisconsin statute. Furthermore, as ample judicial precedent exists for refusing full faith and credit by a state of the forum to such laws of another state as direct the adding of interest to the principal sum in contract actions *(Klaxon*

Co. vs. Stentor Electric Mfg. Co., post, p. 16), as provide for the equitable distribution of the assets of an insolvent corporation *(Clark vs. Williard,* post, p. 15), and provide for the survival of an action for personal injury against the personal representative of a deceased tort feasor *(Gray et al vs. Blight* and *Dougherty vs. Gutenstein,* post, pp. 17, 18) without any attempt to evaluate a contrary public policy of the state of the forum from the standpoint of good morals or of "natural" justice, no basis exists for any attempt to evaluate from the same standpoint the policy fixed by the Wisconsin statute excluding actions for wrongful death from its courts where death was not caused in Wisconsin as is contended for by appellant.

The result of the decision below was to leave appellant's cause of action unaffected because the denial of a remedy to him in Wisconsin left unimpaired his substantive right to be enforced elsewhere in a court that has jurisdiction of his action. As defendant, Fetter, may be subject to suit in this type of case in Illinois, appellant is not deprived of the right to maintain his action there.

The view that a right of action given by a foreign death statute is a property right that ought to be protected is subject to the limitation that due process does not require enforcement of such a right when to do so would be contrary to the public policy of the forum. As a consequence, there has been no taking of any property of the appellant in violation of the due process clause of the Constitution.

The Wisconsin death statute, Sec. 331.03, Wisconsin Statutes, limiting the jurisdiction of its courts in the manner that it does, expresses a valid public policy and violates no right secured to the appellant by the United States Constitution.

ARGUMENT.

I.

The Wrongful Death Statute of Wisconsin, Construed to Prohibit the Maintenance of an Action Based Upon the Wrongful Death Statute of Another State, Does Not Violate the Full Faith and Credit Clause, Art. IV, Sec. 1, of the United States Constitution.

A — The Public Policy of Wisconsin as Expressed in Its Wrongful Death Statute, Sec. 331.03, Stats., Prohibits the Maintenance of an Action Based Upon the Wrongful Death Statute of Another State by Limiting the Right to Bring Such an Action Only for a Death Caused in Wisconsin.

The proviso limiting jurisdiction contained in the Wisconsin wrongful death statute, adopted in 1857, reads as follows:

> "* * * ; provided, that such action shall be brought for a death caused in this state."

The counterpart of the foregoing in the Illinois statute, upon which appellant bases his cause of action, is as follows:

> "Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

The first part of the proviso, ending with the words "outside of this state," was created by the Illinois Laws

of 1903, page 217, Section 1, and the remaining part thereof was added by the Laws of 1935, page 916, Section 1.

The Wisconsin Supreme Court upheld the decision of the trial court in this case that the Wisconsin proviso, in order to have any force or meaning, possesses the same meaning as its counterpart in the Illinois death statute, i.e., it prohibits the bringing of an action for a death occurring outside of Wisconsin and not caused therein, and affirmed the judgment dismissing appellant's complaint.

Hughes vs. Fetter, 257 Wis. 35, 42 N. W. (2d) 452.

See, also,

Crane vs. Chicago & Western Indiana Railroad Co., 233 Ill. 259, 84 N. E. 222; *Dougherty vs. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, L. R. A. 1915F, Ann. Cas. 1913D, 568 and *Rudiger vs. Chicago, etc., R. Co.*, 94 Wis. 191.

By limiting the jurisdiction of its courts in a wrongful death action to one "brought for a death caused in this state," the Wisconsin legislature expressed the public policy of the state positively in a statute and that policy must prevail to the exclusion of appellant's action in the Wisconsin courts.

Dougherty vs. McKenna Process Co., 99 N. E. 619, 621.

"The general rule as to the right to sue in one state under the statute of another state permitting recovery for death by wrongful act is subject to the qualification that the statute of the state under which the cause of action arose shall not be incon-

sistent with the public policy of the state in which the right of action is sought to be enforced. According to some authorities, the standard for measuring the public policy of the forum is the statute thereof."

16 *Am. Jur., Death,* Sec. 405;

Stewart vs. Baltimore & O. R. Co., 168 U. S. 445, 18 S. Ct. 105.

"It is conceded by all the courts that it is not strict right, but comity, which enables one to bring an action in one state or country for a tort, such as negligent death or bodily injuries, caused in another, and that under the principles of comity, such an action will not be entertained if it would violate the public policy of the forum. Thus, a state may refuse the maintenance of an action on a tort arising elsewhere."

11 *Am. Jur., Conflict of Laws,* Sec. 183.

"The statute in another state cannot be made the basis of furnishing a remedy for action in Wisconsin whose maintenance would be wholly inconsistent with the public policy of our state as declared by the legislature. To hold that this action could be maintained notwithstanding that death was not caused in this state would be to override such public policy as declared by statute and would operate to deprive the proviso of purpose or meaning. The plaintiff seeks a remedy denied him by the law of the forum. *Estate of Seybold,* 223 Wis. 192."

Hughes vs. Fetter, supra, p. 42, R. 35.

In *Bain vs. Northern Pacific R. Co.*, 120 Wis. 412, 98 N. W. 241, and in *Sheehan vs. Lewis*, 218 Wis. 588, 260 N. W. 633, actions were maintained on a cause of action based upon the death statute of a state other than Wisconsin for a death not caused in the latter state. No mention of the proviso to Sec. 331.03, Wisconsin statutes, is made in either of the decisions. As a consequence, neither can be cited as proper precedent for the maintenance of appellant's action.

Hughes vs. Fetter, supra, p. 40, R. 35;

State ex rel. Sheboygan vs. Sheboygan County, 194 Wis. 456, 459, 216 N. W. 144, 145.

B — The Statutory Public Policy of Wisconsin Limiting the Jurisdiction of its Courts in Wrongful Death Actions to Those in Which the Death Was Caused in Wisconsin Does Not Contravene the Full Faith and Credit Clause, Art. IV, Sec. 1, of the United States Constitution.

"A statute forbidding the maintenance within the state of actions brought on injury statutes of other states does not contravene a provision of the Federal Constitution requiring each state to give full faith and credit to the public acts, records and judicial proceedings of every other state."

11 *Am. Jur., Conflict of Laws*, Sec. 183, citing *Dougherty vs. American McKenna Process Co.*, supra.

"The sovereign in its discretion may refuse its aid to the foreign right."

Justice Cardozo in *Loucks vs. Standard Oil Co.* (1918), 224 N. Y. 99, 120 N. E. 198, 202, citing in support thereof *Dougherty vs. Am. McKenna Process Co.*, supra, cited by the Wisconsin court in its decision in this case.

"The full faith and credit clause of the Federal Constitution does not require the enforcement of every right conferred by a statute of another state, as where the forum fails to provide a court with jurisdiction of the controversy, where it fails to provide procedure appropriate to its determination, where the enforcement of the right conferred would be obnoxious to the public policy of the forum, * * *."

11 *Am. Jur., Conflict of Laws*, Sec. 11, footnote 13, citing *Fuller vs. Rock*, 125 Ohio St. 36, 180 N. E. 367; 82 *A. L. R.* 802.

"Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment it has recognized that a state is not required to enforce a law obnoxious to its public policy. Bradford Electric Co. vs. Clapper, 286 U. S. 145, 160, 161, 52 S. Ct. 571, 576, 76 L. Ed. 1026, 82 A. L. R. 696; Hartford Indemnity Co. vs. Delta Co., 292 U. S. 143, 150, 54 S. Ct. 634, 636, 78 L. Ed., 1178, 92 A. L. R. 928."

Griffin vs. McCoach, 313 U. S. 498, 507, 61 S. Ct. 1023, 1027.

In *Anglo-American Provision Co. vs. Davis Provision Co.*, 191 U. S. 373 24 S. Ct. 92, it was held that the full faith and credit clause was not violated where the New

York statute denied jurisdiction to its courts of plaintiff's cause of action *because it did not arise within that state.* The Wisconsin wrongful death statute, therefore, by denying jurisdiction to its courts of a cause of action for wrongful death not caused in Wisconsin, i.e., originating in another state under the laws of that state, does not violate the full faith and credit provision of the Federal Constitution.

We quote from the opinion, delivered by Mr. Justice Holmes, 191 U. S. 373, 374, 24 S. Ct. 92, 93, as follows:

> "The state court decides that the cause of action did not arise within the state in the sense of the words of the Code, and, of course, we follow its construction, subject to the inquiry whether the statute as construed is consistent with the Constitution of the United States. See *Northern C. R. Co. vs. Maryland,* 187 U. S. 258, 267, 47 L. Ed. 167, 172, 23 Sup. Ct. Rep. 62. The court also decides that the language goes to the jurisdiction of the court.
>
> "We are of the opinion that the section of the Code as construed is not unconstitutional. The precise point has not been decided by this court, but it has been laid down in cases which raise greater difficulties than the present, that this provision of the Constitution establishes a rule of evidence rather than of jurisdiction. *Wisconsin vs. Pelican Ins. Co.,* 127 U. S. 265, 291, 32 L. Ed. 239, 243, 8Sup. Ct. Rep. 1370; *Andrews vs. Andrews,* 188 U. S. 14, 36, 47 L. Ed. 366, 371, 23 Sup. Ct. Rep. 237. The Constitution does not require the state of New York to give jurisdiction to the supreme (circuit) court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the

judgment is fixed by the Constitution and the act in pursuance of it which Congress has passed. Rev. Stat. Sec. 905 (U. S. Comp. Stat. 1901, p. 677). But the Constitution does not require the state to provide such a court. See *Missouri vs. Lewis*, 101 U.S. 22, 30, *sub. nom Bowman vs. Lewis*, 25 L. Ed. 989, 992."

C — The Contention That the Decision in Broderick vs. Rosner (1935), 299 U. S. 629, 55 S. Ct. 589, Is Authority for the Proposition That the Full Faith and Credit Provision Practically Abolished the Right of a State to Deny Enforcement of Rights, Contrary to Its Public Policy, Arising Under the Statute of Another State, Is Refuted by the Decisions in Subsequent Cases Which Accord No Such Wide Sweeping Effect to the Broderick Decision.

Despite the foregoing, the appellant contends that the case of *Broderick vs. Rosner*, supra, is authority for the proposition that no state can, consistently with the full faith and credit and due process clauses of the United States Constitution, bar by statute the assertion in its courts of a cause of action created under the statute of another state for a death wrongfully caused therein.

That the *Broderick* decision has no such wide-sweeping effect is pointed out in the annotation to the case in 100 *A. L. R.*, 1143 at 1145, as follows:

"Although there are implications that the full faith and credit provision practically abolished the right of a state to deny enforcement of rights, contrary to its public policy, arising under the statute of another state, it is believed that the court did

not intend to adopt a rule as general as this, and that, in view of its recent pronouncement upholding the operative effect of the local public policy to defeat enforcement of rights acquired under the laws of a sister state, which, but for such policy, would be protected under the full faith and credit provision, contrary implications in the reported case (Broderick vs. Rosner (U. S.) ante, 1133), must be taken as qualified by other statements negativing a change in that position, and as being confined to the particular situation before the court. Perhaps the outstanding ground, the ratio decidendi, of the opinion, is that New Jersey may not, under the guise of merely limiting the jurisdiction of its courts, otherwise competent to adjudicate such matters, deny enforcement of rights acquired under the statute of a sister state, which must be given full faith and credit. It is submitted that this ground does not deny to New Jersey the right under its local public policy, if she has a general public policy against stockholders' superadded statutory liability as distinguished from a limited public policy against statutory superadded liability under the statute of another state, to decline to enforce such liability arising under such statute. It merely refuses to recognize the existence in New Jersey of such a local public policy as would warrant the refusal to enforce foreign acquired rights. It would seem that, had New Jersey withheld jurisdiction from its courts to enforce superadded liability of stockholders generally, irrespective of the source from which such liability sprang, a local public policy which would warrant her to decline enforcement of liability arising under the foreign statute would have been established,

and such right would have been conceded even under the full faith and credit provision.'"

(See *Order of United Commercial Travelers vs. Wolfe,* 331 U. S. 586, 616, 67 S. Ct. 1355, 1369, where Mr. Justice Burton, in quoting from the *Broderick* decision, refers to the New Jersey statute as a "special" one, i.e., one establishing a special local policy as opposed to a general public policy.)

The case note then continues by stating that:

"Such an interpretation of the opinion in the *Broderick* case (U. S.) supra, is the only view which reconciles that case with the decision in *Clark vs. Williard* (1935), 294 U. S. 211, 79 L. Ed. 865, 55 S. Ct. 356, 98 A. L. R. 347 * * *."

In *Clark vs. Williard,* supra, decided subsequent to the *Broderick* case, it appears that Montana had a local public policy, applicable alike to foreign and domestic corporations, of subordinating the title of the liquidator appointed under a statute of another state (Iowa) to the lien of execution and attachment creditors against property in Montana of the insolvent foreign corporation debtor obtained subsequent to the appointment of the liquidator.

Mr. Justice Cardozo, delivered the opinion of the Court, which states, among other things, as follows:

"Iowa may say that one who is a liquidator with title, appointed by her statutes, shall be so recognized in Montana with whatever rights and privileges accompanying such recognition according to Montana law. * * * Iowa may not say, however, that a liquidator with title who goes into Montana may

set at naught Montana law as to the distribution of Montana assets, and carry over into another state the rule of distribution prescribed by the statutes of the domicile."

Clark vs. Williard, supra, 294 U. S. 211, 215, 55 S. Ct. 356, 358, 98 *A. L. R.* 347, 376, note.

The result of this decision was to give effect to the Montana law permitting a preference among creditors of the Iowa corporation as to its property in Montana and to give no "faith or credit" to the Iowa statute providing for equitable distribution of the assets.

If the *Broderick* decision had the wide sweeping effect contended for it, the local policy of Montana of tolerating preferences and a race of diligence among creditors would have been required to yield to the Iowa statute governing liquidation of the insolvent Iowa corporation. Very obviously, then, local public policy, as expressed in a state statute, may be allowed to prevail against the statute of another state on the same subject without violating the full faith and credit clause of the Federal Constitution. Most certainly, if the conflicting public policies are to be evaluated as to their respective equities or justice, the Iowa statute should have prevailed, as preferences among those similarly situated is consistent with neither equity nor justice. A right "established in one part of the nation" was not given "nation-wide application in every part" as the decision in *Magnolia Petroleum Co. vs. Hunt*, 320 U. S. 430, 439, 64 S. Ct. 208, 213, requires, according to appellants.

Also, in *Klaxon Co. vs. Stentor Electric Mfg. Co., Inc.*, 312 U. S. 487, 498, 61 S. Ct. 1020, 1022, it was contended that the full faith and credit clause required the state

courts of Delaware to give effect to the New York statute, in connection with an agreement executed in New York, directing that in contract actions interest be added to the principal sum. It was held that *the Constitution does not insure unlimited extraterritorial recognition of all statutes, or of any statute under all circumstances* and that Delaware might disregard the New York statute with respect to adding interest to the principal sum if such application would interfere with its local policy.

In *Gray, et al. vs. Blight* (C. C. A. 10th), 112 F. (2d) 696 (1940), writ of certiorari denied in 311 U. S. 704, 61 S. Ct. 170, 85 L. Ed. 457, the plaintiffs, residents and citizens of the state of Texas, brought an action to recover damages for personal injury and property damage in a United States District Court in Colorado. The automobile collision occurred in the state of Nevada. The wrongdoer, a resident and citizen of Colorado, died subsequent to the accident. The action was against the administratrix of his estate.

Under Nevada law, a cause of action for personal injury is not abated by the reason of the death of the wrongdoer but survives against his representatives. The Colorado law did not so provide.

The Circuit Court of Appeals in its decision, on pages 699 and 700 of the report, states as follows:

> "We are of the opinion that it (statute) declares the public policy of Colorado to permit the prosecution of certain causes of action against the executor or administrator of the wrongdoer after his death, but to exclude therefrom causes of action for injuries to the person.

"Foreign law will not be enforced in the courts of a state under the doctrine of comity where it is contrary to the public policy of such state.

"A state may deny a remedy in its courts upon a tort arising in another jurisdiction."

The case of *Dougherty vs. Am. McKenna Products Co.*, supra, is cited in footnotes in support of the part above quoted.

Local public policy was allowed, therefore, to control and to exclude maintenance of a cause of action for personal injury, although maintainable under the law of Nevada where the cause of action arose. While the cause of action survived under the Nevada statute, no remedy was granted therefor under the statute of the forum.

In New York, a statute declared the public policy to be that no action for personal injuries caused by a deceased tort feasor shall be brought against his personal representative. It was held that a suit against the personal representative of a deceased wrongdoer could not be maintained in New York for personal injuries resulting from negligence of the decedent even though the injuries were inflicted in New Jersey, where the law is that such an action shall not die with the wrongdoer but shall survive against his personal representative. See 132 *A. L. R.* 470, 471, *Annotation*, citing *Dougherty vs. Gutenstein* (1935; D. C.), 10 F. Supp. 782.

If the *Broderick* decision has the sweeping effect contended for, the relief sought by the respective parties plaintiff in Colorado and in New York in the cases cited could not have been constitutionally denied to them.

The decisions in cases made subsequent to that in the *Broderick* case, therefore, refute the contention that the latter holds that the full faith and credit provision of the Federal Constitution requires practically unlimited extra-territorial recognition of all statutes.

Wisconsin may, therefore, withhold jurisdiction from its courts to enforce liability for a wrongful death not caused in Wisconsin as a matter of public policy without violating the full faith and credit clause of the Federal Constitution and without being required to ascribe any justification therefor other than the exercise of an inherent and sovereign power reserved to the states of the nation.

Whatever the purpose of the Wisconsin legislature may have been in confining the jurisdiction of its courts to those actions for wrongful death in which the wrongful act, neglect or default causing death occurred in Wisconsin, if it was to give statutory force to the doctrine of *forum non conveniens* then appellant's action is an appropriate one for the application of such doctrine.

> "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."
>
> *Gulf Oil Corporation vs. Gilbert,* 330 U. S. 501, 507, 67 S. Ct. 839, 842.

In appellant's case, the defendant-driver, Glenn C. Fetter, was amenable to process in Wisconsin by virtue of his residence therein and in the state of Illinois where the accident occurred by virtue of his appointment, as a non-resident driver, of the Secretary of State of Illinois

as his attorney for the service of process in an action arising out of a motor vehicle accident upon an Illinois highway, as provided by Chapter 95 1/2, Sec. 23, Smith-Hurd, Illinois Annotated Statutes.

Without doubt, a trial of appellant's action in Illinois would be more easy, expeditious and less expensive than in Wisconsin. Medical and hospital records would be readily accessible. Unwilling witnesses would be subject to compulsory process for attendance. The cost of procuring the attendance of willing witnesses would be substantially less. A view of the site of the accident could be had. The answer to questions arising as to the proper interpretation of the applicable Illinois law would be made by a trial judge more familiar with Illinois statutes and decisions than a Wisconsin judge would be.

Gulf Oil Corporation vs. Gilbert, supra, 330 U. S. 508, 67 S. Ct. 843.

Furthermore, a judgment obtained in Illinois would be enforceable in Wisconsin under the holding in *Kenney vs. Supreme Lodge, Loyal Order of Moose*, 252 U. S. 411, 40 S. Ct. 371, 10 *A. L. R.* 716, although the cause of action upon which the judgment would be based would not.

II.

The Decisions Principally Relied Upon by Appellant as Authority for His Argument Are Readily Distinguishable and, Therefore, Inapplicable.

The case of *Broderick vs. Rosner*, supra, is distinguishable from the case at bar. The statutory liability sought

to be enforced in the former was *contractual* in character. In the latter, it is a statutory liability in *tort* that is sought to be enforced.

In the opinion, 294 U. S. 643, 55 S. Ct. 593, it is stated:

> "Here the nature of the cause of action brings it within the scope of the full faith and credit clause. The statutory liability sought to be enforced is contractual in character. The assessment is an incident of incorporation. Thus the subject-matter is peculiarly within the regulatory power of New York, as the State of incorporation. 'So much so', as was said in Converse vs. Hamilton, 224 U. S. 243, 260, 32 S. Ct. 415, 419, 56 L. Ed. 749, 'that no other state properly can be said to have any public policy thereon. * * * * * * In respect to the determination of liability for an assessment, the New Jersey stockholders submitted themselves to the jurisdiction of New York. For 'the act of becoming a member (of a corporation) is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation.' Modern Woodmen of America vs. Mixer, 267 U. S. 544, 551, 45 S. Ct. 389, 69 L. Ed. 783, 41 A. L. R. 1384."

Most certainly, what is quoted above as bringing the cause of action under consideration within the scope of the full faith and credit clause is inapplicable to appellant's cause of action based on a wrongful death statute.

The case of *Pink vs. A.A.A. Highway-Express, Inc.*, 314 U. S. 201, 62 S. Ct. 241, concerns the liability of an alleged member of an insolvent mutual insurance company

residing in Georgia for an assessment made in conformity with the statutes of New York, the state of its organization.

In *Magnolia Petroleum Co. vs. Hunt,* 320 U. S. 430, 64 S. Ct. 208, it was held that a compensation award that has become final is entitled to the same faith and credit as a judgment of a court.

In *Milwaukee County vs. M. E. White Co.,* 296 U. S. 268, 56 S. Ct. 229, a suit was involved in a United States District Court of Illinois to recover on a money judgment obtained in Wisconsin.

The question involved in *Williams vs. State of North Carolina,* 317 U. S. 287, 63 S. Ct. 207, concerned the extent to which a judgment of divorce granted in Nevada was entitled to full faith and credit in North Carolina.

The last three cases above referred to, therefore, involve the question of the full faith and credit to be given to a *judgment* in a state other than the one in which it was rendered. Appellant's case here involves not a *judgment* but an *unlitigated cause of action.* Justification for the holdings in the cases involving a judgment can be found in the greater amount of faith and credit that has been accorded to judgments than to unlitigated causes of action. To this effect see *Williams vs. State of North Carolina,* supra, 317 U. S. 211, 63 S. Ct. 211, where it is stated:

> "Thus even though the cause of action could not be entertained in the state of the forum either because it had been barred by the local statute of limitations or contravened local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit.

"A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis."

Milwaukee County vs. M. E. White Co., supra, 296 U. S. 275, 56 S. Ct. 233.

Citation of decisions involving stock assessments or judgments upon litigated causes of action cannot, therefore, serve as authority for determining the issue in appellant's case involving an unlitigated cause of action for wrongful death.

That Congress under authority conferred by the full faith and credit clause of the Constitution, has provided by statute in 1948 for the extra-territorial recognition of statutes as well as judicial proceedings (28 U. S. C., Sec. 1738) does not give any greater weight to an unlitigated cause of action based upon a statute than theretofore existed.

This provision of the Constitution, Art. IV, Sec. 1, and the act in pursuance of it which Congress has passed establishes a rule of evidence rather than of jurisdiction. See quotation from *Anglo-American Provision Co. vs. Davis Provision Co.*, ante, p. 11)

III.

The Alleged National Interest Involved Does Not Outweigh the Local Interest of Wisconsin in the Public Policy Declared by Its Statute Justifying a Disregard of the Latter in Favor of the Former.

Appellant, commencing on page 14 of his brief, points to the present volume of interstate travel by automobile and the number of deaths occurring therein as emphasizing Wisconsin's denial to entertain jurisdiction of an action for a death not caused in Wisconsin. He then states that the frequency of litigation emphasizes the effect of Wisconsin's alleged indifference as against the national interest represented by the full faith and credit clause.

In the first place, any national interest involved is very small. Only two states, Illinois and Wisconsin, limit the jurisdiction of their respective courts by excluding consideration of actions for a death not caused within the state.

In the second place, the situation presented in appellant's case occurs very infrequently if we are to judge from the number of cases reaching the appellate courts. The Wisconsin limitation on jurisdiction has existed since 1857, the year of the enactment of the Wisconsin wrongful death statute. In addition to appellant's action, apparently only two other cases involving the question of the right to maintain an action based on the death statute of another state have reached the Wisconsin Supreme Court in a period of 93 years — *Bain vs. Northern Pacific Railroad Co.*, and *Sheehan vs. Lewis*, cited on page 17 of appellant's brief. In fact, appellant, on page 25 of his brief, admits that "there is a paucity of judicial

authorities directly in point on the subject matter involved."

Assuredly, therefore, no great national interest is involved to outweigh the public policy declared by the Wisconsin death statute with respect to jurisdiction of its courts.

Lastly, Wisconsin will not, as contended, become a haven for those seeking to escape liability in actions of this type. Where a death occurs in another state, the wrongdoer may be sued there because jurisdiction can well nigh universally be obtained over him by reason of his appointment of some state officer as his attorney for the service of process as a condition of his use of the highways of the state as a non-resident driver.

IV.

Wisconsin May Refuse to Enforce a Cause of Action Based Upon the Wrongful Death Statute of Another State as a Matter of Public Policy Without Violating the Due Process Clause of the United States Constitution (Amendments, Art. XIV, Sec. 1).

Wisconsin may deny to its courts the right to entertain jurisdiction of an action for a death not caused therein and based on the statute of another state as a matter of public policy without infringing upon the due process clause of the Federal Constitution.

> "Where this court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amend-

ment, it has recognized that a state is not required to enforce a law obnoxious to its public policy. Bradford Electric Co. vs. Clapper, 286 U. S. 145, 160, 161; Hartford Indemnity Co. vs. Delta Co., 292 U. S. 143, 150."

Griffin vs. McCoach, 313 U. S. 498, 507, 61 S. Ct. 1023, 1027.

The result of the decision in appellant's action was to leave his cause of action unaffected because the denial of a remedy to him left "unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere."

Bradford Electric Light Co. vs. Clapper, 286 U. S. 145, 160, 52 S. Ct. 571, 576, 82 *A. L. R.* 696;

Dalton vs. Webster, 82 N. C. 279.

Plaintiff's substantive right to sue in Illinois was unaffected by the Wisconsin decision denying to him a remedy in Wisconsin. No violation of the due process clause, therefore, is involved. The view that a right of action given by a foreign death statute is a property right that ought to be protected is subject to the limitation that due process does not require enforcement of such a right when contrary to the public policy of the state of the forum.

No vested right is involved as none can exist in a claim for damages for tort, not connected with or growing out of a contractual relation, until judgment is rendered.

16 *Corpus Juris Secundum, Const'l Law*, Sec. 254, p. 676.

Appellant, in his brief, pages 19 and 20, quotes at length from the opinion in *Loucks vs. Standard Oil Co.*,

a New York decision written by Justice Cardozo as a member of the New York Court of Appeals. What is there said was correct in so far as the statutes there under consideration are concerned.

The New York statute, unlike the Wisconsin wrongful death statute, contained no provision limiting the jurisdiction of its courts to actions for a death caused in New York. It, therefore, has a public policy that is different from that of Wisconsin. To permit the enforcement of the Massachusetts wrongful death statute in the courts of New York violates no public policy of the latter state.

Furthermore, the opinion contains statements that support appellee's position herein. We quote from the report of the decision (120 N. E. 198) as follows:

> "The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there." p. 201.
>
> "Sometimes we refuse to act where all of the parties are non-residents. *Burdick vs. Freeman*, 24 N. E. 949, 120 N. Y. 420." p. 201.
>
> "The sovereign in its discretion may refuse its aid to the foreign right. *St. Louis, I., M. & So. Ry. Co. vs. Taylor*, 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061; *Dougherty vs. McKenna Process Co.*, 225 Ill. 369, 99 N. E. 619, * * *". p. 202.

Appellant also, in attempting to distinguish the decision in *Chambers vs. Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 28 S. Ct. 34, on page 23 of his brief, cites a footnote to the opinion in *Broderick vs. Rosner*, hereinbefore cited, to the effect that no claim in the *Chambers* case was made under the full faith and credit clause.

However, the language used in the opinion in the *Chambers* decision is broad enough to include any claim that could have been made under the Constitution. We quote from the decision (207 U. S. 151, 28 S. Ct. 36) as follows:

> "She (plaintiff) has not been denied access to the Ohio Courts because she is not a citizen of this state, but because the cause of action she presents is not cognizable in those courts. * * * *We are unable to see that in this case the plaintiff has been refused any right which the Constitution confers upon her* * * *".* (Emphasis inserted)

CONCLUSION.

It is respectfully submitted that Sec. 331.03 of the Wisconsin statutes, as construed by the Wisconsin Supreme Court, declares a valid public policy and that, therefore, it does not violate the United States Constitution, in the manner contended by the appellant, or otherwise. The decision of the Wisconsin Supreme Court, therefore, should be affirmed.

Respectfully submitted,

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